PERWIRA AFFIN BANK BHD

v.

SARDAR MOHD ROSHAN KHAN & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
LOW HOP BING JCA
SULONG MATJERAIE JCA
AHMAD MAAROP JCA
[CIVIL APPEAL NOS: W-02-586-08 & W-02-722-07]
6 MARCH 2009

BANKRUPTCY: *Capacity of bankrupt - Whether suit maintainable by undischarged bankrupt - Civil litigation actively prosecuted by undischarged bankrupt without obtaining previous sanction of Director General of Insolvency - Section 38(1)(a) Bankruptcy Act 1967 - Undischarged bankrupt incompetent to maintain an action - Steps taken by undischarged bankrupt in pursuing civil proceedings during bankruptcy period null and void - Judgment given for undischarged bankrupt in civil proceedings vitiated*

BANKRUPTCY: *Adjudication order - Annulment - Whether annulment of adjudication order retrospective or prospective in effect - Chin Kon Nam & Anor v. Chai Yun Phin Development Sdn Bhd - Annulment order does not operate retrospectively - Order 42 r. 7(2) Rules of the High Court 1980 - Annulment order takes effect prospectively from date on which it is pronounced*

CIVIL PROCEDURE: *Locus standi - Whether suit maintainable by undischarged bankrupt - Civil litigation actively prosecuted by undischarged bankrupt without obtaining previous sanction of Director General of Insolvency - Undischarged bankrupt incompetent to maintain an action - Steps taken by undischarged bankrupt in pursuing civil proceedings during bankruptcy period null and void - Judgment given for undischarged bankrupt in civil proceedings vitiated*

The respondent-plaintiff ('the customer') was the sole proprietor of Omar Khayam Enterprise. The appellant-defendant ('the bank') had granted banking facilities to the customer. On 4 March 1999, by way of a writ action, the customer sought to recover a sum of RM233,155 with interest, on the basis of the bank's negligence and/or breach of contract. The customer was adjudicated a bankrupt on 27 March 2002. His bankruptcy was only annulled

A on 19 October 2006 ('the annulment order'). However, he did not inform the trial court of his bankruptcy during the period from 27 March 2002 to 19 October 2006 ('the customer's bankruptcy period'). Instead, he proceeded to actively prosecute the trial in the High Court. Without obtaining the Official Assignee's (OA)
B previous sanction to pursue the proceedings, the customer continued to instruct his solicitors to carry on with all the proceedings during the customer's bankruptcy period. The trial took place between 28 October 2004 and 13 July 2006, well within the customer's bankruptcy period. On 29 November 2004,
C a month after the trial started, the customer filed his statement of affairs with the OA. On 27 July 2007, the learned High Court judge gave judgment for the customer. The following questions arose for determination: (i) Upon a true construction of s. 38(1)(a) of the Bankruptcy Act 1967, during the customer's
D bankruptcy period, was the customer competent to maintain an action based on the bank's negligence and/or breach of contract and to actively and vigorously prosecute the trial thereof without the previous sanction of the OA?; and (ii) Having regard to the factual background as alluded to above, and upon a true
E construction of the terms of the annulment order, did the annulment order operate retrospectively so as to wipe out the bankruptcy adjudged against the customer for the period from 27 March 2002 to 19 October 2006, and to validate all steps taken by him in the civil action and proceedings during the
F customer's bankruptcy period in the absence of the OA's previous sanction?.

Held

Per Low Hop Bing JCA:

G

(1) Section 38(1)(a) sets out the incompetence of an undischarged bankrupt to maintain an action. The steps taken by the customer clearly came within the ambit of maintaining an action in s. 38(1)(a) and so attracted the application of
H s. 38(1)(a). The question was therefore answered in the negative. (paras 18 & 23)

(2) The judgment in *Chin Kon Nam & Anor v. Chai Yun Phin Development Sdn Bhd*, to the effect that an annulment order does not operate retrospectively is consistent with the
I s. 105(2) exceptions expressed in *Mohamad Hanifa Mohamed Yusoof*. (para 42)

(3) The relevant statutory provisions contained in s. 38(1)(a), s. 105(1) and (2) and the Bankruptcy Rules 1969 are silent on the retrospective or prospective effect of an annulment order. Given such *lacunae*, r. 276 of the Bankruptcy Rules 1969 makes it mandatory to apply, *mutatis mutandis*, the Rules of the High Court 1980. The general mandatory provision contained in O. 42 r. 7(2) is that the judgment or order shall be dated as of the day on which it was pronounced, given or made. Hence, the date of the order itself would determine the retrospective or prospective effect thereof. The annulment order here was dated 19 October 2006. Hence, under O. 42 r. 7(1), it took effect prospectively from that date, *ie*, the date on which it was pronounced. The question was therefore answered in the negative. (paras 44, 46, 47 & 52)

(4) The steps taken by the customer in pursuing the civil proceedings and in prosecuting the trial in the High Court during the customer's bankruptcy period were clearly null and void, thereby vitiating the judgment given for the customer. (para 53)

Bahasa Malaysia *Translation Of Headnotes*

Responden-plaintif ('pelanggan') ialah tuan punya tunggal Omar Khayam Enterprise. Perayu-defendan ('bank') telah memberi kemudahan perbankan kepada pelanggan. Pada 4 Mac 1999, melalui suatu tindakan writ, pelanggan cuba mendapat balik suatu jumlah sebanyak RM233,155 dengan bunga, atas dasar kecuaian bank dan/atau pemungkiran kontrak. Pelanggan telah dihukum bankrap pada 27 Mac 2002. Kebankrapannya hanya dibatalkan pada 19 Oktober 2006 ('perintah pembatalan'). Walau bagaimanapun, beliau tidak memberitahu Mahkamah perbicaraan tentang kebankrapannya semasa jangka masa dari 27 Mac 2002 ke 19 Oktober 2006 ('jangka masa kebankrapan pelanggan'). Sebaliknya, beliau terus dakwa perbicaraan itu di Mahkamah Tinggi. Tanpa mendapat sanksi sebelumnya Pegawai Pemegang Harta ('OA') untuk meneruskan prosiding, pelanggan terus mengarahkan peguamcaranya untuk meneruskan dengan semua prosiding semasa jangka masa kebankrapan pelanggan. Perbicaraan dijalankan di antara 28 Oktober 2004 dan 13 Julai 2006, jelas dalam jangka masa kebankrapan pelanggan. Pada 29 November 2004, sebulan selepas perbicaraan bermula, pelanggan memfail

pernyataan urusannya dengan OA. Pada 27 Julai 2007, yang arif hakim Mahkamah Tinggi memberi penghakiman yang berpihak kepada pelanggan. Soalan-soalan berikut berbangkit untuk dibicarakan: (i) Atas satu pentafsiran sebenar s. 38(1) Akta Kebankrapan 1967, semasa jangka masa kebankrapan pelanggan, adakah pelanggan kompeten untuk mengekalkan suatu tindakan berdasarkan kecuaian bank dan/atau pemungkiran kontrak dan untuk dakwa dengan aktif dan bersemangat perbicaraannya tanpa sanksi sebelumnya OA? dan (ii) Memandangkan latar belakang faktual seperti yang dikatakan di atas, dan atas suatu pentafsiran betul terma-terma perintah pembatalan, adakah perintah pembatalan beroperasi secara retrospektif supaya dapat menghapuskan kebankrapan yang dihukum terhadap pelanggan dari jangka masa 27 Mac 2002 ke 19 Oktober 2006, dan untuk mengesahkan semua langkah-langkah yang diambil oleh beliau dalam tindakan sivil dan prosiding semasa jangka masa kebankrapan pelanggan dalam ketiadaan sanksi sebelumnya OA?.

Diputuskan
Oleh Low Hop Bing HMR:

(1) Seksyen 38(1)(a) menyatakan tak kompetens seseorang bankrap tidak dilepaskan untuk mengekalkan suatu tindakan. Langkah-langkah yang diambil oleh pelanggan jelas termasuk dalam lingkungan mengekalkan suatu tindakan dalam s. 38(1)(a) dan oleh itu menarik penggunaan s. 38(1)(a). Soalan itu, oleh itu, dijawab secara negatif.

(2) Penghakiman dalam *Chin Kon Nam & Anor v. Chai Yun Phin Development Sdn Bhd*, kepada efek bahawa suatu perintah pembatalan tidak beroperasi secara retrospektif, ialah konsisten dengan pengecualian s. 105(2) yang dinyatakan dalam *Mohamad Hanifa Mohamed Yusoof*.

(3) Peruntukan-peruntukan relevan yang dikandungi dalam ss. 38(1)(a), 105(1) dan (2) dan Kaedah-kaedah Kebankrapan 1969 tidak menyatakan apa-apa tentang penguatkuasaan retrospektif atau prospektif sesuatu perintah pembatalan. Memandangkan *lacunae* sebegitu k. 276 Kaedah-kaedah Kebankrapan 1969 menjadikannya madatori untuk menggunakan, *mutatis mutandis*, Kaedah-kaedah Mahkamah Tinggi 1980. Peruntukan mandatori am yang dikandungi dalam A. 42 k. 7(2)

ialah bahawa penghakiman atau perintah itu sepatutnya bertarikh pada hari yang sama ia diumumkan, diberi atau dibuat. Oleh itu, tarikh perintah itu akan menentukan penguatkuasaan retrospektif atau prospektifnya. Perintah pembatalan di sini bertarikh 19 Oktober 2006. Oleh itu, di bawah O. 42 r. 7(1), ia berkuatkuasa dari tarikh itu, iaitu, tarikh ia diumumkan. Soalan itu, oleh itu, dijawab secara negatif.

(4) Langkah-langkah yang diambil oleh pelanggan dalam meneruskan dengan prosiding sivil dan dalam mendakwa perbicaraan di Mahkamah Tinggi semasa jangka masa kebankrapan pelanggan jelas batal dan tak sah, oleh itu menjadikan penghakiman yang berpihak kepada pelanggan tidak sah.

Case(s) referred to:

Amos William Dawe v. Development & Commercial Bank Ltd Berhad [1980] 1 LNS 133 ***(refd)***

Bailey v. Johnson [1872] LR7 Ex 263 ***(refd)***

Bathamani Suppiah v. Southern Finance Co Bhd [2000] 2 CLJ 650 HC ***(refd)***

Chin Kon Nam & Anor v. Chai Yun Phin Development Sdn Bhd [1996] 1 CLJ 444 HC ***(refd)***

Christopher Tan Kok Ching v. Bolhassan Di (No 2) [1998] 5 CLJ 177 HC ***(refd)***

Dato Hj Mohd Muslim Othman v. Shuaib Lazim & Anor [1993] 2 CLJ 177 HC ***(refd)***

Director of Public Prosecutions v. Ashley [1955] Crim LR 565 ***(refd)***

K Ismail Ganey Rowther and Co, First Defendant v. MA Abdul Kader, The Official Assignee of the property of KP Peer Mohamed, A Bankrupt [1933] MLJ 98 CA ***(refd)***

Kwong Yik Bank Bhd v. Hah Chiew Yin [1985] 2 CLJ 31; [1985] CLJ (Rep) 178 FC ***(refd)***

M/s Laksamana Realty Sdn Bhd v. Goh Eng Hwa [2004] 1 CLJ 274 CA ***(refd)***

Mohamad Hanifa Mohamed Yusoof v. Sikandar Batcha Abdul Majeed [2002] 7 CLJ 77 ***(refd)***

More v. More [1962] 1 All ER 125 ***(refd)***

Oates v. FCT [1990] 27 FCR 289 ***(refd)***

Pardo v. Bingham [1870] LR 4 Ch App 735 ***(refd)***

R v. Kappava [1935] MLJ 237 ***(refd)***

Re Chua Tin Hong Ex parte Castrol (M) Sdn Bhd [1997] 3 CLJ Supp 174 ***(refd)***

Re Coyle and Another [1994] 120 ALR 527 ***(refd)***

Re Hayes; Ex parte Hayes [1985] 59 ALR 219 ***(refd)***

A *Re Keet [1905] 2 KB 666* ***(refd)***
Re Lai Hee Sang, Ex p Asia Commercial Finance (M) Bhd [2000] 7 CLJ 302 ***(refd)***
Re Low Kok Tuan Ex p Arab-Malaysian Merchant Bank Bhd [1997] 4 CLJ 185 ***(refd)***
B *Re Mat Sari Hamid Ex Parte United Asian Bank Bhd [1993] 1 CLJ 202 HC* ***(refd)***
Richland Trade & Development Sdn Bhd & 2 Ors v. United Malayan Banking Corporation Berhad [1995] 1 LNS 206 HC ***(refd)***
Roberts v. Wayne Roberts Concrete Constructions Pty Ltd 40 ACSR 204 ***(refd)***
C *Sabah Bank Bhd v. Syarikat Bintang Tengah Sdn Bhd & Ors [1992] 1 LNS 41 HC* ***(refd)***
Supreme Finance (M) Bhd v. Mohamad Noor Yusuf & Ors [1993] 1 LNS 158 HC ***(refd)***
Tan King Hiang v. United Engineers (Singapore) Pte Ltd [2005] 3 SLR 529 ***(refd)***
D *Tg Iskandar Tg Ahmad v. Sime Bank Bhd [2001] 7 CLJ 560 HC* ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, ss. 38(1)(a), (2), 105(1), (2)
Bankruptcty Rules 1969, r. 276
E Rules of the High Court 1980, O. 42 r. 7(1), (2)
Societies Act 1966, s. 9A(1)(d)

Bankruptcy Act 1883 [UK], s. 35(1)
Bankruptcy Act 1914 [UK], s. 29(1)
Bankruptcy Act 1966 [Aust], ss. 153A, 153B, 154(1)(a), (2)
F Bankruptcy Act [Sing], s. 131(1)(a)

Other source(s) referred to:
Khoo Kay Ping's, *Law and Practice of Bankruptcy in Malaysia,* 2nd edn, p 216

G *For the appellant - M/s Mah-Kamariyah & Philip Koh*
For the respondent - M/s YS Woo & Proctor

[Appeal from High Court, Kuala Lumpur; Suit No: S2-22-125-1999]

Reported by Amutha Suppayah

H

JUDGMENT

Low Hop Bing JCA:

Appeals

I

[1] The appellant-defendant ("the bank") has filed two related appeals against two separate decisions of the learned judge of the Kuala Lumpur High Court. These appeals are:

Appeal No	Decision Appealed Against
(1) W-02-586-08	The bank's application, which sought to set aside the judgment dated 27 July 2007 given for the respondent-plaintiff ("the customer"), was dismissed with costs.
(2) W-02-722-07	Judgment with costs was given for the customer on 27 July 2007.

[2] By consent of the parties, Appeal No (1) was heard first, as the outcome thereof would have a direct bearing on Appeal No (2).

[3] On 20 February 2009, we allowed these two appeals with costs, set aside the judgment given for the customer and ordered the deposits to be refunded to the bank. We now give our grounds.

Factual Background

[4] The customer was the sole proprietor of Omar Khayam Enterprise.

[5] The bank had granted banking facilities to the customer.

[6] On 4 March 1999, by way of a writ action *vide* Kuala Lumpur High Court Civil Suit No. 2-22-155-1999, the customer sought to recover a sum of RM233,155 with interest, on the basis of the bank's negligence and/or breach of contract.

[7] The customer was adjudicated a bankrupt on 27 March 2002. His bankruptcy was only annulled on 19 October 2006. However, he did not inform the trial court of his bankruptcy during the period from 27 March 2002 to 19 October 2006 ("the customer's bankruptcy period"). Instead, he proceeded to actively and vigorously prosecute the trial in the High Court. He continued to instruct his solicitors to carry on with all the proceedings, to call witnesses at the trial, to cross-examine them, to raise objections, to file written submissions, to present oral submissions and to take all other related steps during the customer's bankruptcy period, which covered all the pre-trial proceedings and all the aforesaid

steps taken during the trial of the action. The trial took place between 28 October 2004 and 13 July 2006, well within the customer's bankruptcy period.

[8] On 29 November 2004, a month after the trial started, the customer filed his statement of affairs with the official assignee (OA), now re-designated as the Director General of Insolvency. (For convenience, we shall refer to these two designations interchangeably). Undoubtedly, the customer has full knowledge of his bankruptcy when he proceeded to instruct his solicitors to actively and vigorously pursue all proceedings and to prosecute the trial in the High Court.

[9] On 13 October 2006, the customer instructed his solicitors to apply for an order of annulment of his bankruptcy on the ground that he had settled all outstanding sums due and owing to his creditors. An order for annulment was granted on 19 October 2006 ("the annulment order").

[10] During the customer's bankruptcy period, he had not obtained the OA's previous sanction to pursue the proceedings and prosecute the trial in the High Court. In fact, the OA *vide* letter dated 29 August 2007 categorically clarified that his office was not aware of the customer's action in the High Court.

[11] On 27 July 2007, the learned High Court judge gave judgment for the customer.

Is The Bankrupt Competent To Maintain His Action?

[12] Learned counsel Mr. Ben Chan (assisted by Mr B H Yap and Ms Caryn Wong) submitted for the bank that during the customer's bankruptcy period, the customer was incompetent to maintain his action in the High Court without the previous sanction of the OA, in view of s. 38(1)(a) of the Bankruptcy Act 1967. (A reference hereinafter to a section is a reference to that section in the Bankruptcy Act 1967 ("the Act") unless otherwise stated).

[13] Mr. George Proctor, the customer's learned counsel, contended that at the time of filing the action on 4 March 1999, the customer was not a bankrupt and, notwithstanding the customer's bankruptcy period, the customer was competent to maintain the proceedings and prosecute the trial in the High

Court, on the basis of *Richland Trade & Development Sdn Bhd & 2 Ors v. United Malayan Banking Corporation Berhad* [1995] 1 LNS 206 HC.

[14] In the light of the above submissions, we are of the view that the question for determination under this head may be formulated as follows:

> Upon a true construction of s. 38(1)(a), during the customer's bankruptcy period, is the customer competent to maintain an action based on the bank's negligence and/or breach of contract and to actively and vigorously prosecute the trial thereof without the previous sanction of the OA?.

[15] We shall first consider the contention carved out for the customer.

[16] In *Richland Trade & Development Sdn Bhd, supra,* cited for the customer, the plaintiffs filed a suit against the defendant on 15 September 1993. The writ was duly served. The second plaintiff was subsequently declared a bankrupt on 17 October 1993. On 24 February 1994, the defendant made an application to strike out the second plaintiff by reason of the latter's bankruptcy. The defendant's application was dismissed, being devoid of merits. Vincent Ng J (now JCA) said that:

(1) There was no necessity for the bankrupt to withdraw the action, but only to obtain the OA's sanction which the bankrupt had secured on 22 April 1994; and

(2) Had the second plaintiff taken any further step or action in the proceedings against the defendant pending the said sanction (which was not the case there) such step could be nullified.

[17] It is abundantly clear to us that the judgment in *Richland Trade & Development Sdn Bhd, supra,* is in no position to assist the customer in the instant appeal as the facts are substantially dissimilar. The bankrupt there had not taken any further step or action in the proceedings prior to the procurement of the OA's sanction. Indeed, the bankrupt had only taken steps or actions in the proceedings after he had secured the OA's previous sanction. Hence, the facts there are readily distinguishable from those in the instant appeal.

[18] Section 38(1)(a) sets out the incompetence of an undischarged bankrupt to maintain an action in the following words:

> (1) Where a bankrupt has not obtained his discharge:
>
> (a) the bankrupt shall be incompetent to maintain any action (other than an action for damages in respect of an injury to his person) without the previous sanction of the Director General of Insolvency;

[19] We find it pertinent to put in place the principles enunciated by the courts in considering s. 38(1)(a), as follows:

(1) The word "action", which has not been defined in the Act, must be given its plain meaning ie civil action or civil proceedings in court: per Augustine Paul JC (now FCJ) in *Re Chua Tin Hong Ex parte Castrol (M) Sdn Bhd* [1997] 3 CLJ Supp 174, which in turn referred to *R v. Kappava* [1935] MLJ 237;

(2) Such civil action or proceedings include:

(a) the filing of a notice of appeal: *Amos William Dawe v. Development & Commercial Bank Ltd. Berhad* [1980] 1 LNS 133 FC; *Re Low Kok Tuan Ex p Arab-Malaysian Merchant Bank Bhd* [1997] 4 CLJ 185, 189E HC; and *Bathamani Suppiah v. Southern Finance Co. Bhd* [2000] 2 CLJ 650 HC;

(b) an application for stay of the bankruptcy proceedings: *Re Lai Hee Sang Ex p Asia Commecial Finance (M) Bhd* [2000] 7 CLJ 302, 304;

(c) an application to set aside a default judgment upon which the bankruptcy proceedings are founded: *Sabah Bank Bhd v. Syarikat Bintang Tengah Sdn Bhd & Ors* [1992] 1 LNS 41 HC; *Supreme Finance (M) Bhd v. Mohamad Noor bin Yusuf & Ors* [1993] 1 LNS 158 HC; and *Re: Mat Sari Hamid Ex Parte United Asian Bank Bhd* [1993] 1 CLJ 202, 203 HC;

(d) a counterclaim: *M/s Laksamana Realty Sdn Bhd v. Goh Eng Hwa* [2004] 1 CLJ 274;

(See also Khoo Kay Ping's *"Law and Practice of Bankruptcy in Malaysia"* 2nd edn. p. 216);

(3) (a) The word "maintain" does not mean that a bankrupt cannot keep alive any action without the previous sanction of the OA; the bankrupt is not required to withdraw that action and file afresh upon obtaining the sanction as it would work injustice on the bankrupt: *Richland Trade & Development Sdn Bhd, supra;* and

(b) The words "maintain any action" are wide enough to cover both the bringing or continuing of an action already brought: *K Ismail Ganey Rowther and Co., First Defendant v. M.A. Abdul Kader, The Official Assignee of the property of KP Peer Mohamed, A Bankrupt* [1933] MLJ 98 CA FMS;

(4) The adjudication of a party as a bankrupt does not mean that all pending actions of that party would lapse or abate on that account, or that the bankrupted party is required to withdraw the actions pending the obtaining of sanction from the OA. What that party could not do without such a sanction was to take any further step in the proceedings: see the majority judgment of the Singapore Court of Appeal in *Tan King Hiang v. United Engineers (Singapore) Pte Ltd* [2005] 3 SLR 529, 536) which considered s. 131(1)(a) of the Bankruptcy Act (Cap 20, 2000 Rev. Ed) of Singapore (which is equipollent to our s. 38(1)(a));

(5) The bankrupt's solicitor could be ordered to personally pay costs, for filing an originating motion for the bankrupt who was not competent to proceed with that originating motion, as this is a basic principle of law which every reasonably competent solicitor would have known: *Tan King Hiang, supra*;

(6) In an action based on breach of contract by the defendant (as opposed to an action in respect of an injury to the bankrupt's person), the bankrupt's estate and cause of action are vested in the OA upon adjudication and unless the prior sanction of the OA is obtained to maintain the action, the bankrupt is incompetent to do so in his own name or to employ an advocate and solicitor to act on his own behalf without the sanction: *Chin Kon Nam & Anor v. Chai Yun Phin Development Sdn Bhd* [1996] 1 CLJ 444, 446 HC; *Sabah Bank Bhd, supra, Tan King Hiang, supra;* s. 24(4); s. 48; and *Re Low Kok Tuan, supra;*

A (7) The requirement of a sanction is not just a formality; it goes to his capacity: per Abdul Hamid Mohamad FCJ (later CJ Malaysia) in *Goh Eng Hwa, supra*, CA at p. 104; and

(8) The steps taken by a bankrupt in civil action or proceedings
B without the previous consent of the OA in contravention of s. 38(1)(a) are null and void: *Goh Eng Hwa,* CA, *supra*; *Richland Trade & Development Sdn Bhd* HC, *supra;* and *Christopher Tan Kok Ching v. Bolhassan Di (No. 2)* [1998] 5 CLJ 177 HC.

C **[20]** We would add that the OA's previous sanction required under s. 38(1)(a) is a statutory recognition of public interest and public policy considerations.

[21] The legal process of bankruptcy does not merely concern the judgment debtor or the bankrupt alone. A large section of the
D public would be directly or indirectly affected. That calls for intervention by the State and the exercise of jurisdiction by the courts. Broadly speaking, in the first instance, the judgment creditor initiates the process in the High Court to obtain adjudication and receiving orders. The OA then comes into the
E picture to take over the assets, if any, of the bankrupt. The OA's duty is to realise the assets and distribute the proceeds thereof, if any, to the judgment creditors whose interest would require protection and safeguard through the functionary of the OA. The bankrupt is then subject to certain disabilities and disqualifications.
F He cannot willy-nilly incur further debts. Hence, s. 38(1)(a) is intended, *inter alia*, to ensure that the bankrupt's affairs are properly regulated and supervised by the OA eg, by way of the OA's previous sanction before the bankrupt is competent to maintain an action thereunder.

G

[22] The public interest and public policy considerations are further accentuated in s. 38(2) which provides for the consequences of the bankrupt's default in performing or observing s. 38 generally, and more specifically the requirement for the OA's
H previous sanction prescribed in s. 38(1)(a). Section 38(2) creates the offence of contempt of court and the punishment therefor. It merits reproduction as follows:

> (2) A bankrupt who makes default in performing or observing this
I section (or a condition imposed pursuant to subsection (1A)) shall be deemed guilty of contempt of court, and shall be punished accordingly on the application of the Director General of Insolvency.

[23] The steps taken by the customer as adumbrated above clearly come within the ambit of maintaining an action in s. 38(1)(a) and so attract the application of the principles set out above in relation to s. 38(1)(a). Our answer to the above question is therefore in the negative.

Is The Annulment Order Retrospective?

[24] The bank contended that the annulment order was not retrospective in effect. In support of this argument, reference was made to:

(1) O. 42 r. 7(1) and (2) of the Rules of the High Court 1980;

(2) S. 105(1) and (2);

(3) S. 38(1)(a);

(4) *Chin Kon Nam, supra*;

(5) *Bailey v. Johnson* [1872] LR 7 Ex 263, 265;

(6) *Re Hayes; Ex parte Hayes* [1985] 59 ALR 219;

(7) *Re Coyle and Another* [1994] 120 ALR 527; and

(8) *Roberts v. Wayne Roberts Concrete Constructions Pty Ltd* 40 ACSR 204.

[25] The customer took the position that the annulment order operated retrospectively, to "wipe out the bankruptcy altogether and put the bankrupt in the same position as if there had been no adjudication", seeking support from:

(1) In *Re Keet* [1905] 2 KB 666, 676 CA ("Keet");

(2) *Kwong Yik Bank Bhd v. Hah Chiew Yin* [1985] 2 CLJ 31; [1985] CLJ (Rep) 178 FC; and

(3) *Mohamad Hanifa Mohamed Yusoof v. Sikandar Batcha Abdul Majeed* [2002] 7 CLJ 77 HC.

[26] The above conflicting contentions call for the determination of the following question:

A Having regard to the factual background as alluded to above, and upon a true construction of the terms of the annulment order, does the annulment order operate retrospectively so as to wipe out the bankruptcy adjudged against the customer for the period from 27 March 2002 to 19 October 2006, and to validate all steps B taken by him in the civil action and proceedings during the customer's bankruptcy period in the absence of the OA's previous sanction?.

[27] We note that the customer's submission springs from Stirling LJ's statement in *Keet, supra*, at p. 676 ie an annulment order C would "wipe out the bankruptcy altogether, and put the bankrupt in the same position as if there had been no adjudication" (collectively, "Stirling LJ's statement").

[28] At this juncture, it is necessary to identify the material facts D and issue for determination in order to ascertain the *ratio decidendi* in *Keet, supra*. There, the bulk of the bankrupt's creditors who had proved their debts in the bankruptcy executed a deed releasing him absolutely, without any consideration, from his debts owing to them, and agreed to withdraw their proofs; the few remaining E creditors he paid in full in cash. The bankrupt then applied for and obtained from the registrar of the county court an annulment of his bankruptcy on the ground that all his debts, which had not been released, had been paid in full. On appeal, the Divisional Court affirmed the annulment order. On further appeal, the Court F of Appeal disagreed with the Divisional Court and set aside the annulment order. In the Court of Appeal, the issue for determination was whether the debts of the bankrupt were paid in full. Three separate judgments were delivered, the common tenor being the construction of s. 35(1) of the Bankruptcy Act G 1883 (UK) which is equipollent to our s. 105(1) and, where relevant, provides that "… where it is proved to the satisfaction of the court that the debts of the bankrupt are paid in full, … the court may, on the application of any person interested, by order, annul the adjudication".

H **[29]** The first judgment, delivered by Vaughan Williams LJ at p. 674, held, *inter alia*, that the words in s. 35(1) (UK) "that the debts of the bankrupt are paid in full" mean that "the proved debts are paid in full". These debts include not only those which are still entitled to share in the distribution of the bankrupt's I estate, but also those which, having been proved, have not been

discharged by payment in full. The "condition of annulment is payment in full of all debts which have been admitted to proof, unless the proof has been expunged on the ground that it never ought to have been admitted". A

[30] In the second judgment, Romer LJ held at p. 675 that the word "debts" refers to debts which, at the date of the application for annulment, are no longer existing as such; debts which have been proved, and rightly proved, in the bankruptcy. B

[31] Pausing here for a moment, it is singularly significant to note that these two learned Lord Justices were only concerned with the true issue whether the debts of the bankrupt were paid in full. C

[32] In delivering the third judgment, and airing the same view as the other two judges, Stirling LJ added the above statement. Be that as it may, he also made it absolutely clear at p. 676 that the question therein was whether an annulment order ought to be made there, and that the first point which has to be considered was whether the bankrupt has satisfied the condition "that the debts of the bankrupt are paid in full". His Lordship held that the debts included, at least, all debts which have been actually and properly proved in the bankruptcy and payment in full, a payment of money and not releases given in consideration of a small payment; and still less can releases given without any consideration at all. That would not entitle the bankrupt to an annulment order. D E F

[33] In our analysis of the three separate judgments in *Keet, supra,* we find that apart from the true issue and the setting aside of the annulment order, the Court of Appeal was not concerned with the retrospective effect of the annulment order. Hence, with the utmost respect, Stirling LJ's statement cannot be regarded as *ratio decidendi;* it is mere *obiter dictum*. G

[34] The ratio of a judgment is to be retrieved by reference to the material facts of the case giving rise to an issue or question for determination. In other words, it is the ground or reason for the decision, based on the material facts and issue for determination. The ground or reason for the decision is formulated by reference thereto. Such ground or reason would then evolve into a binding principle or rule which enjoys the enhanced status of ratio. Conversely, a statement made merely by way of H I

observation or something said in passing (such as Stirling LJ's statement) cannot rank as ratio. At most, it qualifies as *obiter* which does not bring about any binding quality.

[35] *Keet, supra,* was considered some 50 years later in *More v. More* [1962] 1 All ER 125 where a debtor landlord was liable to a creditor tenant on an undertaking to repay to him on his ceasing to occupy a farm the difference between the rent that he had paid to the debtor and the amount expended by the debtor for repairs. On the petition of the creditor in respect of another debt, the debtor was adjudicated bankrupt. The creditor did not prove in bankruptcy the debtor's contingent liability on the undertaking. The bankruptcy was annulled under s. 29(1) of the Bankruptcy Act 1914 (UK) as the debtor had paid all the proved debts in full. Subsequently the creditor, who had continued to occupy the farm and to pay the rent, died. His personal representatives sued the tenant on the undertaking. Cross J applied, *inter alia*, the judgment of Vaughan Williams, LJ, in *Keet, supra,* but made no mention of Stirling LJ's statement, and held that after the annulment of the bankruptcy, the creditor's right of action against the debtor in respect of the unproved debt, *viz* the contingent liability on the undertaking revived, and, accordingly, the action lay.

[36] Within our shores, in *Kwong Yik Bank Bhd, supra*, the Federal Court considered our s. 105(1) and applied Stirling LJ's statement in *Keet, supra*. Kwong Yik Bank had obtained judgment in the sum of RM30,000 together with interest against the bankrupt. In 1979, a sum of RM15,000 was paid towards the reduction of the judgment debt. By 1981, the balance due and owing plus accumulated interest was RM30,000 or thereabout. In October 1981, Kwong Yik Bank caused a bankruptcy notice to be issued against the bankrupt, and this was followed by the creditor's petition. On 5 July 1982, receiving and adjudication orders were made against the bankrupt. The bankrupt's statement of affairs showed that there was only one creditor ie Kwong Yik Bank. The bankrupt's husband then approached Kwong Yik Bank with a view to effect a settlement in order to enable the bankrupt to apply to the court to have the adjudication order annulled. With the money provided by the bankrupt's brother-in-law, a sum of RM6,000 was paid to Kwong Yik Bank on 28 August 1982 and another sum of RM10,000 was paid on 2 November 1982. On 27 January 1983, the bankrupt filed a notice of motion under

s. 105(1) to have the adjudication order annulled on the ground that the bankrupt's debts had been paid in full. The High Court granted an order in terms thereof. Kwong Yik Bank's appeal was allowed by the Federal Court on the ground that the bankrupt has failed to satisfy that the proved debt lawfully due to Kwong Yik Bank had been paid in full in cash.

[37] As *Kwong Yik Bank, supra*, and *Keet, supra*, do not concern the issue whether an annulment order has retrospective effect, we hold that the application and adoption by the Federal Court of Stirling LJ's statement is similarly *obiter* and not the ratio thereof.

[38] Stirling LJ's statement was applied by the learned trial judge whose decision is now the subject matter of this appeal, and also in the following High Court judgments:

(1) *Dato Haji Mohd Muslim bin Othman v. Shuaib bin Lazim & Anor* [1993] 2 CLJ 177 HC where, *vide* an election petition, the petitioner sought various declarations, *inter alia*, that the first respondent, who was elected at the by-election of the State Constituency of Pantai Merdeka in Alor Setar, was an unfit and disqualified person on the day of the filing of the nomination papers on 12 March 1990 ("the nomination day"), as he was allegedly a bankrupt at the material time. The first respondent sought to set aside the petitioner's election petition on the ground, *inter alia*, that the first respondent was never a bankrupt as the adjudication and receiving orders, made against him on 21 February 1990, had been annulled on 16 March 1990. Abdul Malek J (later PCA) applied Stirling LJ's statement in *Keet, supra*; (as followed in *Kwong Yik Bank, supra*), and held that the first respondent was not a bankrupt on nomination day and was therefore not a disqualified person for the purposes of election;

(2) *Tg Iskandar Tg Ahmad v. Sime Bank Bhd* [2001] 7 CLJ 560 HC, where the judgment debtor was adjudged bankrupt on 27 September 1990. The adjudication was annulled on 16 March 1998. Suriyadi J (now JCA) held, that once the annulment order was granted on 16 March 1998, the legal effect was that the debtor would be reinstated to his original position, as if he had never been declared a bankrupt all the way back to 27 September 1990 ie it operated retrospectively;

(3) *Mohamad Hanifa, supra*, where the defendant (Hanifa) was a bankrupt, having been adjudged on 6 November 1997. Pursuant to s. 9A(1)(d) of the Societies Act 1966 and art. 17(6) of KIMMA's Constitution, he could not be an office bearer of the association ie KIMMA. On 31 July 2001, on the plaintiff's application by way of originating summons in the High Court, Abdul Aziz J (now FCJ) ordered the defendant to hand over to the plaintiff the records and documents of KIMMA and to refrain from holding himself out as the president of KIMMA for the session 2000-2002. The defendant then applied to the learned judge for stay of the orders of 31 July 2001, pending his appeal to the Court of Appeal. For the stay application, the defendant produced evidence that on 24 November 2000, before the plaintiff filed his originating summons, the adjudication and receiving orders made against him on 6 November 1997 had been annulled, on the ground that his debts were paid in full. The learned judge granted the stay, holding that the annulment order there has retrospective effect, but subject to s. 105(2), which means that there are exceptions thereto. Section 105(2) merits reproduction as follows:

> **Power of court to annul adjudication in certain cases**
>
> 105. (1) ...
>
> (2) Where an adjudication is annulled under this section, all sales and dispositions of property, and payments duly made, and all acts theretofor done by the Director General of Insolvency, or other person acting under his authority, or by the court, shall be valid, but the property of the debtor who was adjudged bankrupt shall vest in such person as the court appoints, or in default of any such appointment revert to the debtor for all his estate or interest therein on such terms and subject to such conditions, if any, as the court declares by order.

[39] It needs to be noted that:

(1) Unlike the instant appeal, in all the aforesaid High Court judgments which applied Stirling LJ's statement, the respective parties had not submitted for consideration by the respective judges the following material factors:

(a) the term(s) of the annulment order including the date thereof;

(b) the provisions of O. 42 r. 7(1) and (2); and

(c) the judgments of the Australian Courts;

(2) Further, in *Mohamad Hanifa, supra*, the learned judge recognized that the issue in *Keet, supra*, was not whether the annulment of bankruptcy has retrospective effect; the issue being whether "the debts of the bankrupt are paid in full" for the purposes of s. 35(1) (UK), *supra,* (similar to our s. 105(1)).

[40] It needs to be noted that in *Chin Kon Nam, supra*, Abdul Kadir Sulaiman J (later FCJ) took a different view and held that:

(1) the annulment of receiving and adjudication orders resulting in the removal of the incapacity ie the bankruptcy of the first plaintiff by the court order of 9 January 1995 would not render competent the action of the first plaintiff commenced during the period of his incapacity without compliance with the provisions of s. 38(1)(a), and before the grant of the annulment order by the Court; and

(2) without the prior sanction of the OA, during the period of incapacity, the first plaintiff was incompetent to engage an advocate and solicitor to represent him.

[41] So far, only our High Courts have had the opportunity to consider and decide on this issue. They have given two conflicting views. Now, we have to decide which is the better and correct view.

[42] We wish to immediately emphasise that the judgment in *Chin Kon Nam, supra*, to the effect that an annulment order does not operate retrospectively is consistent with the s. 105(2) exceptions expressed in *Mohamad Hanifa, supra*, and also the judgments of the Australian Courts in considering corresponding provisions in their bankruptcy law. By way of illustration:

(1) In *Re Hayes, supra,* the bankrupt was adjudged as such by order of the Supreme Court of Queensland on 16 December 1976. A further sequestration order was made on 28 April 1977, by the Federal Court of Australia, on the petition of a

creditor who was listed as a creditor in the statement of affairs filed in respect of the Queensland proceedings. By order of the Federal Court of Australia made on 4 October 1983, the bankruptcy was annulled pursuant to s.154(1)(a) of the Bankruptcy Act 1966 (Commonwealth of Australia) ("the 1966 Act") (similar to our s.105(1)). Spender J opined that an annulment does not mean *void ab initio* for all purposes, because:

(a) Under s. 154(2) of the 1966 Act (Cth of Australia), the validity of acts done by the trustee or any person acting under the authority of the trustee or of the court before that annulment is expressly preserved;

(b) Any offence committed during the period of bankruptcy prior to the annulment is still an offence and is not undone retrospectively by an annulment order: *Director of Public Prosecutions v. Ashley* [1955] Crim LR 565 and comment thereon in 18 Mod LR 415; and

(c) In *Bailey v. Johnson, supra,* Blackburn J expressly abstained from giving an opinion as to whether the effect of annulment is in every case to go back to the beginning;

(2) In *Re Coyle and Another, supra,* the applicants, whose bankruptcies commenced on 15 April 1991, sought to have those bankruptcies annulled to enable them to prosecute an action against their former solicitors. The solicitors in turn sought to dismiss that action on the ground that it was a nullity. Drummond J of the Federal Court of Australia held, *inter alia*, that the effect of an annulment under ss. 153A and 153B of the 1966 Act (the Cth of Australia) would generally be that the bankruptcy is set aside *ab initio* and the annulled bankruptcy will be treated as never having taken place for any purpose, save for those set out in s. 154 of the 1966 Act (Cth of Australia) and other special kinds of situations referred to in *Oates v. FCT* [1990] 27 FCR 289; 99 ALR 167, where Hill J said:

> Having regard to s. 154(2) of the Bankruptcy Act, it seems clear that it will not be correct to say that the consequence of annulment is that the bankruptcy is avoided for all purposes *ab initio*. Further, it is clear that an offence committed during the period in which the bankruptcy

continues under s. 43(2)(c) is still an offence notwithstanding the annulment: *Director of Public Prosecutions v. Ashley* [1955] Crim LR 565 and cf *Re Hayes; Ex parte Hayes* [1984] 59 ALR 219 at 223; and

(3) In *Roberts v. Wayne Roberts Concrete, supra*, the bankrupt there issued a statutory notice to wind up a company. Subsequently, the bankrupt obtained an annulment order. Barrett J of the New South Wales Supreme Court upheld the company's objection to the bankrupt's capacity to issue the statutory notice, as the bankrupt's right of action had been vested in the trustee (in Malaysia, the OA) at the time of the issuance of statutory notice and the bankrupt, being not a 'creditor" of the company, cannot commence winding up proceedings against the company, notwithstanding the annulment order.

[43] Reverting to the mainstream of the instant appeal, in order to determine whether the annulment order operates retrospectively or prospectively, we must consider the material facts which would dictate the application of the relevant statutory provisions. These material facts are:

(1) the date and specific terms of the annulment order;

(2) the existence of criminal liability; and

(3) the vesting of the bankrupt's right of action in the OA.

[44] We find that the relevant statutory provisions contained in s. 38(1)(a), s. 105(1) and (2), and the Bankruptcy Rules 1969 are silent on the retrospective or prospective effect of an annulment order. Given such lacunae, r. 276 of the Bankruptcy Rules 1969 makes it mandatory to apply, *mutatis mutandis*, the Rules of the High Court 1980. Rule 276 reads as follows:

276. Rules of the High Court applicable in the event of lacunae

In the absence of any rule regulating any proceeding under the Act or these Rules, the Rules of the High Court shall apply, *mutatis mutandis*.

[45] This leads us to the application of O. 42 r. 7(1) and (2) which regulate the date on which a judgment or order of the court (such as an annulment order) shall take effect, in the following words:

Date from which judgment or order takes effect (O. 42 r. 7)

7. (1) A judgment or order of the Court takes effect from the day of its date.

(2) Such a judgment or order shall be dated as of the day on which it is pronounced, given or made, unless the Court orders it to be dated as of some other earlier or later day, in which case it shall be dated as of that other day.

[46] Under O. 42 r. 7(1) and (2), the retrospective or prospective effect of an order of the court (such as the annulment order) is to be ascertained by reference to the material date specified therein: O. 42 r. 7(1). The general mandatory provision contained in O. 42 r. 7(2) is that the judgment or order shall be dated as of the day on which it was pronounced, given or made. By way of exception, the court may order it to be dated earlier or later, in which case the order shall be dated as of that other day. Hence, the date of the order itself is of paramount importance, as such date would determine the retrospective or prospective effect thereof.

[47] In the instant appeal, the annulment order was dated 19 October 2006. Hence, under O. 42 r. 7(1), it takes effect prospectively from that date, ie the date on which it was pronounced. This prospective effect of the annulment order is further fortified by the relevant term thereof, which reads as follows:

> Perintah Penerimaan dan Perintah Penghukuman bertarikh 27 Mac 2002 terhadap sibankrap, Sardar Mohd Roshan Khan @Sardar Fruz Khan di atas hendaklah dan **dengan ini yang demikian adalah dibatalkan dan dimansuhkan.** (emphasis added).
>
> Our Translation:
>
> The Receiving Order and the Adjudication Order dated 27 Mac 2002 against the bankrupt, Sardar Mohd Roshan Khan @Sardar Fruz Khan shall and **hence is hereby rescinded and annulled.** (emphasis added).

[48] The specific use of the words "dengan ini yang demikian adalah dibatalkan dan dimansuhkan" (or in English "hence is hereby rescinded and annulled") signify that the annulment is to take effect from 19 October 2006 ie prospectively, and not retrospectively.

[49] The fundamental rule of English Law, the common law, is that no statute shall be construed so as to have a retrospective operation, unless the language is such as plainly to require such a construction: *Craies, supra,* at p. 388. In *Pardo v. Bingham* [1870] LR 4 Ch. App. 735, 739, 740, Lord Hatherley succinctly stated this rule of construction as follows:

> … except there be a clear indication either from the subject-matter or from the wording of a statute, the statute is not to receive a retrospective construction.

[50] We are of the view that this fundamental rule of construction applies with equal force to the construction of an order of the court, such as the annulment order, pursuant to O. 42 r. 7(1) and (2).

[51] Further, the annulment order cannot be construed retrospectively, because:

(1) that would remove the criminal liability ie contempt of court under s. 38(2); or

(2) the bankrupt's property, including the right of action in the High Court, has already been vested in the OA by virtue of the bankruptcy: s. 105(2).

[52] In the circumstances, we accept and approve the view expressed in *Chin Kon Nam, supra,* as the better and correct view. We therefore answer the above question in the negative.

Conclusion

[53] The steps taken by the customer in pursuing the civil proceedings and in prosecuting the trial in the High Court during the customer's bankruptcy period are clearly null and void, thereby vitiating the judgment given for the customer. We therefore allowed Appeal No. (1) and consequently Appeal No. (2) with costs, set aside the judgment of the High Court and ordered that the deposits thereof be refunded to the bank.

[54] My learned brothers, Sulong bin Matjeraie, JCA and Ahmad bin Haji Maarop, JCA have read this judgment in draft and have expressed their agreement with it to become the judgment of the court.